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No. 91-1702

In the Supreme Court of the United States

OCTOBER TERM, 1991

CARL W. CORTEZ, PETITIONER

v.

FIRST CITY NATIONAL BANK OF HOUSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal for lack of jurisdiction when the notice of appeal was filed 102 days after the final order dismissing petitioner's action, and no timely motion for reconsideration had tolled the period for filing a notice of appeal.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Bankers Mortgage Co. v. *United States*, 423 F.2d 73 (5th Cir.), cert. denied, 399 U.S. 927 (1970)	6
Browder v. *Director, Department of Corrections*, 434 U.S. 257 (1978)	5
Cortez v. *Price*, cert. denied, 489 U.S. 1024, rehearing denied, 489 U.S. 1100 (1989)	2
Enterprise International, Inc. v. *Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5th Cir. 1985)	7
Farguson v. *MBank Houston, N.A.*, 808 F.2d 358 (5th Cir. 1986)	4, 7
High v. *Zant*, 916 F.2d 1507 (11th Cir. 1990), cert. denied, 111 S. Ct. 1432 (1991)	6
Martin-Trigona, In re, 737 F.2d 1254 (2d Cir. 1984)	7
National Surety Co. v. *State Bank*, 120 F. 593 (8th Cir. 1903)	6
Smith v. *Barry*, 112 S. Ct. 678 (1992)	5
United States v. *Robinson*, 361 U.S. 220 (1960)	5

Constitution, statute and rules:

U.S. Const. Amend. I	6
28 U.S.C. 1404(a)	3
Fed. R. App. P. 4(a)(1)	5
Fed. R. Civ. P.:	
Rule 55(e)	4
Rule 59	5
Rule 60(b)	2, 3

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) dismissing the appeal is unreported. The opinion of the district court (Pet. App. A3-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1991. A petition for rehearing was denied on December 2, 1991. The petition for a writ of certiorari was filed on February 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner filed an action against five banks in the United States District Court for the Southern District of Texas, Houston Division. The action alleged fraud, constructive fraud, breach of warranty, violations of the Racketeer Influenced and Corrupt Organizations Act, violations of the federal Electronic Fund Transfer Act, conversion, and negligence. In 1987, the district court dismissed the case with prejudice, noting that petitioner had demonstrated "among the worst examples of bad faith in litigation that [the judge had] seen." The district court entered judgment on behalf of the banks and imposed sanctions against petitioner. Pet. App. A4.[1]

Petitioner filed a motion for reconsideration, alleging a fraud on the court. The motion for reconsideration was denied. Petitioner then sought to appeal the judgment to the Fifth Circuit *in forma pauperis*, but leave to appeal without paying the docketing fee was denied. When petitioner failed to pay the appropriate fee, the case was dismissed. Pet. App. A4. Petitioner filed a petition for a writ of certiorari, which this Court denied, and a petition for rehearing, which was also denied. *Cortez* v. *Price*, 489 U.S. 1024, rehearing denied, 489 U.S. 1100 (1989).

2. Petitioner then filed a complaint in the United States District Court for the Middle District of Florida styled as an "Independent Action for Relief from Judgment—Fraud" pursuant to Federal Rule of Civil Procedure 60(b). The complaint challenged a judgment imposing sanctions against petitioner for filing "frivolous litigation." Pet. App. A4-A5. The action named as defendants the same five banks, or their successors-in-interest, that had been defendants in the 1985 Texas

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[1] Those banks were First City National Bank of Houston, MBank Houston, MBank Memorial, Peoples Bank, and Petrobank.

lawsuit. One of the banks filed a motion to have the case transferred to the United States District Court for the Southern District of Texas. The Federal Deposit Insurance Corporation, as receiver for MBank Houston (FDIC-Receiver), also moved the district court to dismiss the complaint, or in the alternative, to transfer the case to the district court in Texas.[2]

On April 11, 1990, the district court in Florida transferred the case to the district court in Texas pursuant to 28 U.S.C. 1404(a). Petitioner filed a motion for reconsideration of that order, which was denied. On July 5, 1990, petitioner filed a petition for writ of mandamus in the Eleventh Circuit. On July 13, 1990, petitioner also appealed the district court's denial of his motion for reconsideration to the Eleventh Circuit. On November 9, 1990, the court of appeals denied the petition for writ of mandamus. On December 12, 1990, the court of appeals dismissed the appeal for lack of jurisdiction, holding that the order transferring the case was not a final appealable order.[3]

3. On April 4, 1991, the district court in Texas entered a final order of dismissal and an injunction. The district court's memorandum opinion noted that, in the original 1985 lawsuit, after exhibiting "among the worst examples of bad faith in litigation that this Court has seen" and after failing to pay the sanctions imposed against him, petitioner then waited over two years to seek relief under Rule 60(b). Pet. App. A5. The district court dismissed the action, finding that petitioner failed

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[2] See Appellees' Mem. Regarding Jurisdiction, *Cortez* v. *First City National Bank*, No. 90-3718 (11th Cir. filed Sept. 1990); Def. FDIC's Mot. to Dismiss Compl., *Cortez* v. *First City National Bank*, No. 90-12-Civ-T-17-B (M.D. Fla. filed Apr. 11, 1990).

[3] The court of appeals' rulings were made in unpublished orders in *In re Cortez*, No. 90-3636 (11th Cir. Nov. 9, 1990); *Cortez* v. *First City National Bank*, No. 90-3718 (11th Cir. Dec. 12, 1990).

to satisfy the elements that must be met before an independent action can be used to challenge a prior judgment. Pet. App. A4-A5. In so doing, the district court found that petitioner's claims were frivolous, and that prior monetary sanctions remained unpaid and had proved unsuccessful in deterring petitioner from filing such frivolous litigation. Relying on *Farguson* v. *MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986), and other authority, the district court enjoined petitioner from filing "any similar litigation against these defendants, their agents, successors or attorneys" until petitioner paid the prior sanctions and obtained leave of the court. Pet. App. A5.

On April 23, 1991, petitioner filed a petition under Federal Rule of Civil Procedure 55(e) requesting the district court to set aside its order of April 4, 1991. On May 17, 1991, the district court denied that petition. Pet. App. A2.

4. On July 15, 1991, petitioner filed an appeal in the Fifth Circuit. Appellee FDIC-Receiver filed a motion to dismiss the appeal for lack of jurisdiction as untimely, because it was filed 102 days after the April 4, 1991, final order dismissing the case. On October 30, 1991, the court of appeals dismissed the appeal for lack of jurisdiction, and denied a petition for rehearing on December 2, 1991. Pet. App. A1.

ARGUMENT

The court of appeals correctly dismissed petitioner's untimely appeal for lack of jurisdiction. The court's decision does not conflict with any decision of this Court or of any other court. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 6-12) that the court of appeals violated his right to equal protection by failing to reverse the district court order denying him relief from

an entry of sanctions in an earlier lawsuit. Petitioner fails to address the lack of jurisdiction in the court of appeals, which required dismissal of the appeal.

The time period for filing an appeal is mandatory and jurisdictional. *Smith* v. *Barry*, 112 S. Ct. 678, 680 (1992) ("Rule 3 of the Federal Rules of Appellate Procedure conditions federal appellate jurisdiction on the filing of a timely notice of appeal."); *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*, 361 U.S. 220, 229 (1960). The purpose of the rule is clear: it sets a definite point in time when litigation shall end. *Browder*, 434 U.S. at 264. Pursuant to Fed. R. App. P. 4(a)(1), the notice of appeal in a civil case must be filed "within 30 days after the date of entry of the judgment or order appealed from."

Petitioner's notice of appeal was filed 102 days after the district court's final order of April 4, 1991. The court of appeals therefore lacked jurisdiction to hear the appeal. His petition for reconsideration in district court did not toll the period for filing a notice of appeal. It was filed April 23, 1991, more than ten days after the final order of April 4, 1991. A motion under Rule 59 must be filed within ten days of judgment in order to toll the time for filing an appeal. An untimely motion under the rules of civil procedure "could not toll the running of time to appeal under Rule 4(a)." *Browder*, 434 U.S. at 265. Thus, petitioner's notice of appeal was untimely, and the court of appeals properly dismissed the appeal for lack of jurisdiction.

2. In any event, the district court properly dismissed petitioner's independent action for relief from the 1987 sanctions judgment. The essential elements to maintain an independent action for relief from judgment are: (1) that equity and good conscience preclude enforcement of the prior judgment; (2) there exists a good defense to the cause of action upon which the judgment is founded; (3)

fraud, accident, or mistake prevented the defense from being asserted; (4) the party challenging the judgment is free from fault or neglect; and (5) there is no adequate remedy at law. *Bankers Mortgage Co.* v. *United States*, 423 F.2d 73, 79 (5th Cir.), cert. denied, 399 U.S. 927 (1970); *National Surety Co.* v. *State Bank*, 120 F. 593, 599 (8th Cir. 1903). Here, the district court determined that petitioner failed to demonstrate that the prior judgment, which imposed sanctions for filing frivolous litigation and for exemplifying bad faith in litigation, should not be enforced. Pet. App. A5. Petitioner also failed to allege a good defense to the sanctions which he was prevented from asserting by reason of fraud, and failed to demonstrate that he was free from fault or neglect. *Ibid.* These findings are within the sound discretion of the district court, and are reviewable on appeal only for abuse of discretion. *High* v. *Zant*, 916 F.2d 1507 (11th Cir. 1990), cert. denied, 111 S. Ct. 1432 (1991). It was not an abuse of discretion to conclude that petitioner had not been prevented from asserting his defense where petitioner had alleged fraud in a motion to reconsider the original sanction judgment, that defense was rejected in a denial of the motion, Pet. App. A4, and an appeal of the denial of the motion was dismissed.

3. Even if petitioner had filed a timely appeal before the court of appeals, petitioner would not have been entitled to relief from the injunction. Petitioner argues (Pet. 12) that the court of appeals' order was "unlimited and unspecific" and that it therefore violated his First Amendment right to petition the government in that it precludes him from instituting further lawsuits against these defendants. That contention is in error. First, the district court's injunction only prohibits petitioner from filing an action relating to the subject matter of this lawsuit against these five particular defendants. The injunction is specific and limited, and serves to effectuate

the district court's judgment and protect these defendants from further litigation on claims which twice were found to be frivolous. Such an injunction is a proper exercise of the district court's authority. *Farguson* v. *MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986). Second, where monetary sanctions are ineffective in deterring vexatious filings, enjoining such filings is appropriate. *Farguson*, 808 F.2d at 360; *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir. 1984).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner's reliance on *Enterprise International, Inc.* v. *Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5th Cir. 1985) is misplaced. The court there examined the elements for granting a preliminary injunction sought by a party; it did not address the court's ability to effectuate its judgment by injunction.